COPY

IN THE

Supreme Court of the United States

October Term, 1959.

No. 1011

JERRY GIRARDI,

Petitioner,

v.

[redacted]Y

LIPSETT, INC.,

Respondent,

v.

ANDER SHONIS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

JERRY GIRARDI, by his attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 7, 1960.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is to be found in 174 F. Supp. 813 (D. C. E. D. Pa., 1959). The opinion of the Court of Appeals is to be found in 275 F. 2d 492 (C. A. 3, 1960). This is the final judgment of the United States Court of Appeals for the Third Circuit where judgment was entered for respondent Lipsett affirming the judgment of the United States District Court for the Eastern District of Pennsylvania.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 7, 1960 (18a, Appendix herewith). Its order denying a petition for a rehearing was entered on March 31, 1960 (19a, Appendix herewith). The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

Where a District Court prohibits a jury from considering plaintiff's competent, relevant evidence which raises a clear conflict with admitted evidence of the defendant on the controlling issue of the defense of statutory employment:

1. Is not a judgment for defendant a denial of a federal right to trial by jury?

2. Does not the Seventh Amendment to the Constitution of the United States command that a new trial be granted so that a jury may consider plaintiff's evidence?

CONSTITUTIONAL PROVISION AND THE STATUTE INVOLVED.

1. Constitution of the United States, Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. Section 203 of the Pennsylvania Workmen's Compensation Act, Act of June 2, 1915, P. L. 736; Act of June 4, 1937, P. L. 1552; Act of June 21, 1939, P. L. 520, 77 P. S. § 52 (1952) which provides as follows:

> "An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employee or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employee or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employee".

STATEMENT OF THE CASE.

Jurisdiction below was based on diversity of citizenship as between petitioner and respondent Lipsett, Inc. ("Lipsett"). Although suit was originally brought against Pennsylvania Power & Light Company also, that suit was dismissed on grounds of lack of diversity.

Petitioner is 48 years old and lives in Williamsport, Pennsylvania. He is married and has four children (87a).

On November 4, 1955, while he was engaged in removing valuable metal salvage in the control room of what had been the Pennsylvania Power & Light Company ("P. P. & L.") power house at Williamsport, Pennsylvania a panel fell upon him and permanently paralyzed him from the waist down. This common-law negligence suit was brought for the redress of those injuries against P. P. & L. and Lipsett. Lipsett brought in respondent Ander Shonis ("Ander Shonis") as a third-party defendant. At the time of the accident Ander Shonis was petitioner's actual employer.

On November 5, 1954, Lipsett purchased from P. P. & L. certain substations, one of them being located at Williamsport. Under the terms of this contract of purchase, Lipsett was to pay $1,000,000.00 for these stations to P. P. & L. (150a). Lipsett purchased all the buildings there located and the equipment therein. It did not buy the land itself (92a). Lipsett purchased this merchandise among which were valuable salvageable fixtures located in the very building where petitioner was hurt. The substation was bought to yield metal located therein which would be resmelted and then packaged and sold to steel mills, foundries and smelting plants (92a-93a). Lipsett paid for these goods on November 16, 1954 by check (93a). It was then to go in and get its merchandise out of the buildings (93a).

The fact was that Lipsett did not exercise any further control after July 25, 1955, when it had Cooper, its super-

intendent, remove all of its equipment and take all of its men away from the job (90a, 91a). This was also admitted in the pleadings (81a-84a). *Indeed, Lipsett's counsel made a judicial admission in court that Lipsett did not thereafter have any actual and or in fact control or possession of the premises* (81a). He relied solely upon the right to control as the test under applicable Pennsylvania law to sustain his argument of statutory employment (81a).

From that time on, Lipsett had no one on the job. It entered into a contract with Ander Shonis on *August 29, 1955* under which Ander Shonis agreed only to demolish the plant and prepare and outload all the steel and iron. *Lipsett had left the premises before the contract with Ander Shonis was entered into.*

Ander Shonis did not start work until the contract was signed, which was August 29, 1955 (53a). From then until the time of the accident,—November 4, 1955—Lipsett had no superintendent on the job nor anyone supervising the work (60a). The only thing that Lipsett did was to tell Ander Shonis where to ship the material (59a).

Lipsett had begun the work itself, but shortly thereafter turned the whole job over to Ander Shonis. Ander Shonis, however, did not buy any of the property, nor ever get title to any of it (95a). Lipsett agreed to pay Ander Shonis purely for services it was rendering in salvaging the materials (96a).

Upon special interrogatories, the jury found that Lipsett was negligent and that petitioner suffered damages in the amount of $100,000.00. The petitioner is a chair-ridden paralytic as a result of the accident. Those issues thereafter dropped out of the case and are not involved here.

In his charge to the jury the trial judge instructed:

> ". . . The Court: Members of the jury, the fact that none of Lipsett's employees remained at the plant after Ander Shonis commenced work under his sub-contract has no bearing on the statutory employer

> status of Lipsett. The point that I made and I am leaving with you is this: It is the right of control that governs . . . ." (143a)

Although the lower courts here have held that the true test is the right to control under Pennsylvania law (and we do not now contest the accuracy of that aspect of the instruction) that portion of the instruction which charged this evidence out of the case is of central importance here.

Petitioner immediately excepted to this instruction (144a-145a); preserved the point on his motion for a new trial (162a); raised and briefed the point below although the Court of Appeals declined to deal with it in its opinion; and pressed it as one of the fundamental grounds for granting the petition for a rehearing of the judgment of affirmance below. The unavoidable consequences of that exclusionary instruction generate this Petition.

Having rejected petitioner's contention that control *in fact* was the applicable legal test of statutory employment, the trial court submitted this interrogatory to the jury:

> "A. Does the evidence in this case satisfy you by a fair preponderance thereof in accordance with the instructions given to you, and do you find . . .
>
> "2. That Lipsett, Inc., *retained the right to control the work* necessary to complete its contract with Pennsylvania Power and Light Company in accordance with the terms of the contract of November 5, 1954." (146a) (Emphasis ours.)

Relying upon the jury's affirmative answer to the interrogatory, the District Court entered judgment for Lipsett. It decided that this finding by the jury compelled a legal conclusion of the statutory employment of the petitioner. Lipsett's third-party action was dismissed (161a).

It was petitioner's contention, *inter alia*, that (1) assuming that right to control or right to possession of the

premises was, in law, the proper test, there had occurred in this case such *total* and *complete* delivery of the *entire* job by Lipsett to Ander Shonis that in no circumstances could Ander Shonis be considered Lipsett's subcontractor and (2) that the trial court improperly permitted the jury to consider the fact that respondent had the right to tell Ander Shonis where to ship the merchandise as evidence of respondent's right to control.

In its opinion entering judgment for Lipsett, the District Court stated the main issue thus:

> "The principal, although not the sole issue on this motion, is whether the Court correctly interpreted § 203 as requiring merely a right of control as opposed to actual physical control. If the Court is in error in that regard, plaintiff is entitled to judgment in the amount of $100,000, since Lipsett clearly did not exercise actual control . . ." (167a)

That issue of construction and interpretation is no longer in the case at this stage, the Court of Appeals having affirmed the judgment for respondent by agreeing with the District Court's view of the statute. But in its affirmance, the Court of Appeals reached its judgment by sacrificing the other great issue in the case, and the one around which this Petition turns.

Upon the promulgation of the opinion and judgment below on March 7, 1960, petitioner timely filed a petition for rehearing expressly assigning as grounds therefor the above-mentiond exclusionary instruction which charged the subject evidence out of the case, and which petitioner has consistently pressed as error. Without opinion, the Court of Appeals denied the petition for rehearing by its order of March 31, 1960. This Petition follows.

REASONS FOR GRANTING THE WRIT.

1. In effectively denying petitioner his right to a federal jury trial on the issue of statutory employment, the decision below is in conflict with *Byrd v. Blue Ridge Rural Electric Cooperative,* 356 U. S. 525, 78 S. Ct. 893 (1958), and *Magenau v. Aetna Freight Lines, Inc.,* 360 U. S. 273, 79 S. Ct. 1184 (1959).

2. The decision below deprives petitioner of his right to federal trial by jury under the Seventh Amendment to the Constitution of the United States on the issue of statutory employment.

3. The question of the applicability of the Seventh Amendment to the Constitution of the United States on the issue of statutory employment in federal trials is undecided by this Court and is of great public importance to the administration of federal courts in view of the near universality of workmen's compensation laws and the frequency with which issues of immunity thereunder recur in federal litigation. This issue was expressly reserved for future decision by this Court in *Byrd v. Blue Ridge Rural Electric Cooperative, supra.* Now this Court is directly and unavoidably confronted with meeting and deciding that point.

ARGUMENT.

Introduction.

When the case at bar is stripped to its irreducible terms at this stage of the appellate proceedings, it can be stated in five precise propositions:

1. It has now been held in this case (and we may no longer contest the holding) that under § 203 of the Pennsylvania Workmen's Compensation Act of June 2, 1915, P. L. 736; Act of June 4, 1937, P. L. 1552; Act of June 21, 1939, P. L. 520, 77 P. S. § 52 (1952) "control" means the right to control and not control *in fact*.

2. Lipsett's right to control was held to be proven (1) by evidence of contractual obligations to P. P. & L., and (2) by evidence that Lipsett told Ander Shonis where to ship the scrap.

3. Having been permitted to submit this evidence, Lipsett was given trial by jury on the issue of statutory employment.

4. Countervailing evidence offered by petitioner could have been found by a jury to support petitioner's contention that Lipsett did not even have the right to control and, therefore, even on the now adjudicated construction of the statute, Lipsett's defense would have fallen if the jury accepted petitioner's evidence.

5. The trial court originally admitted undisputed proof that Lipsett was absent from the premises and exercised no right of control. This would unquestionably have sustained a jury finding that Lipsett had no right of control. The court then baselessly charged all of this evidence out of the case and petitioner thus lost his right to trial by jury of the basic issue in the case.

This position is not an afterthought on petitioner's part. He has insistently maintained and pressed it throughout the proceedings below. It was asserted and argued as error before the trial court (162a); before the Court of Appeals at the original briefing and argument; and it formed one of the two bases for our petition for a rehearing which is part of the certified transcript of the record here.

I.

The Decision Below Is in Conflict With the Decisions of This Court in Byrd v. Blue Ridge Rural Electric Cooperative, 356 U. S. 525, 78 S. Ct. 893 (1958) and Magenau v. Aetna Freight Lines, Inc., 360 U. S. 273, 79 S. Ct. 1184 (1959).

In the *Byrd* case, *supra*, which was also a diversity action, respondent's defense was in gist the same as Lipsett's defense: statutory employment and therefore workmen's compensation was the exclusive remedy. By its construction of the South Carolina statute, the District Court held that even if respondent's evidence was accepted as true, its affirmative defense was legally insufficient to create a jury issue and there was therefore nothing for petitioner to meet with proof of its own.

The Court of Appeals disagreed with the District Court's construction of the statute, but rather than grant a new trial at which petitioner might offer proof pertinent to appellate construction of that statute, the Court of Appeals made its own determination of the record and directed judgment for the respondent.

This Court framed the issues in *Byrd* thus, per Mr. Justice Brennan at 356 U. S. 528, 78 Ct. 896:

> ". . . (1) whether the Court of Appeals erred in directing judgment for respondent without a remand to give petitioner an opportunity to introduce further evidence; and (2) whether petitioner, state practice

notwithstanding, is entitled to a jury determination of the factual issues raised by the defense."

The instant decision below—indeed this litigation from its outset—is barren of an element that complicated the *Byrd* case: whether the issue of immunity is triable to court or jury. Unquestionably, the issue here *is* triable to a jury.

Precisely that issue was submitted to the jury (134a, 146a) and *Lipsett's* evidence on that issue was used by the Court of Appeals to support its holding. 275 F. 2d 492 at 496. But the trial court categorically instructed the jury to ignore *petitioner's* evidence on the identical issue.

This Court answered both of the issues in *Byrd* affirmatively. In doing so it laid down a command in the case at bar that petitioner was entitled to a trial by jury—to a jury hearing of his evidence on the issue of right to control. He did not get that when the trial court took that evidence from the jury's consideration, yet the truth is that this was the great strength of petitioner's case. What was taken from him by the exclusionary instruction was exactly what *Byrd* said the petitioner had a right to present. If in *Byrd* petitioner had a right to present such evidence if he had it, this petitioner, who demonstrably did have such evidence, certainly has no less a right to have a jury consider such evidence when it was presented.

In *Magenau, supra*, another diversity case where the defense again was statutory employment, trial by jury yielded a judgment for petitioner. The Court of Appeals for the Third Circuit reversed on grounds that the Pennsylvania Workmen's Compensation Act was the exclusive remedy. After *Magenau* was argued in the Court of Appeals this Court decided *Byrd*.

It granted certiorari on the question of whether in the light of *Byrd* ". . . the matter of the relationship of [petitioner's] decedent to respondent was a jury question" (at 360 U. S. 274, 79 S. Ct. 1186). Its conclusion was that a jury question existed in those circumstances.

The essential issue in *Magenau* is indistinguishable from that now at bar. In each case the issue—the nature of employment of petitioner's decedent in *Magenau* and the existence of a right to control here—should be triable to a jury. In each case the same Workmen's Compensation Act is involved. The answer to each of those questions of fact, *after trial by jury*, determines the availability of statutory employment as a defense. Petitioner there did not get such a trial. This Court gave it to him. We pray for nothing more than the same relief.

In refusing to grant a new trial, the lower court has irrefutably fallen into conflict with the rule of *Byrd* and the rule of *Magenau*. For that reason alone, the Writ should issue.

II.

The Seventh Amendment to the Constitution of the United States Compels Trial by Jury for Petitioner on the Issue.

We submit that aside from considerations of the *Byrd* and *Magenau* cases, *supra*, the root error involved here is that the Seventh Amendment commands that when statutory immunity is raised as an effective defense countervailing evidence raising an issue to that defense must be submitted to the jury. In the *Byrd* case, this Court expressly left open ". . . the constitutional question whether the right of jury trial protected in Federal Courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted . . . as an affirmative defense in a common-law negligence action." 356 U. S. 537, fn. 10, 78 S. Ct. 901, fn. 10.

That precise question is presented in this case. We assume here that the correct statutory test was the right to control, but we insist that the jury was not permitted to pass upon the most effective evidence producible and in fact produced by the petitioner on this judicial issue.

There is no doubt that the excluded evidence was legally admissible. There has never been any contrary judicial suggestion nor any attempt on the part of the trial judge to justify that exclusion on grounds of rules of evidence or any other grounds. Indeed there was never even a word from the Court of Appeals acknowledging that the exclusion occurred to the virtual destruction of petitioner's factual resistance to the defense of immunity.

It was, we submit, evidence which was at least as relevant and competent as the evidence to which we originally objected (127a) as irrelevant that Lipsett told Ander Shonis where to ship the scrap. That evidence, be it noted, was urged by Lipsett in its argument to the jury in support of the defense (149a) and was held by the Court of Appeals to be ". . . some evidence of Lipsett's right to control." 275 F. 2d 492 at 496. Petitioner's evidence which was certainly as competent, *and would certainly have been issue-producing*, was rendered inert under the trial court's exclusionary instruction.

Perhaps there are more direct methods (such as directing a verdict) for taking trial by jury from a litigant, but certainly this method is just as effective. It lends lip service to the right to trial by jury when in all practicality it has been withheld. Charging petitioner's evidence out of the case left him with nothing to contradict Lipsett's evidence and no basis, save the consequently weakened argument that Lipsett's evidence was incredible, to have a jury find for him on the issue of statutory employment.

When a judge directs a verdict in the face of an issue of fact, it is a denial of a constitutional right to trial by jury. *Lowry v. Seaboard Airline R. Co.*, 171 F. 2d 625 (C. A. 5, 1948). See also *Slocum v. New York L. Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523 (1913). We submit that when a trial judge refuses to allow a jury to consider evidence which is legally admissible and productive of conflicts of fact which, as here, are at the very heart of the entire case, it is and must be an equivalently unlawful denial of the

right of trial by jury guaranteed by the Seventh Amendment.

The ultimate truth is that had the excluded evidence been admitted, this jury might well have and in all probability would have reached the finding that Lipsett did *not* have the right to control, a finding that would have given this grievously injured human being a judgment that came out of a secured constitutional process rather than a procedure that gave his opponent exactly what was taken from him: trial by jury. If petitioner is to be denied, let it be done only after his voice, too, is heard by a jury.

CONCLUSION.

The Writ should issue; the judgment below should be reversed and the case ordered remanded for a new jury trial limited to the issue of whether or not Lipsett had the right to control necessary to support its defense of immunity.

Respectfully submitted,

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APPENDIX.

OPINION OF THE U. S. DISTRICT COURT.

July 15, 1959

CLARY, *J.*

This is an action by plaintiff, a resident of Pennsylvania, against defendant, Lipsett, Inc., a New York contracting firm, to recover damages for injuries sustained when he was dismantling equipment at an electric station in Williamsport, Pennsylvania. At the trial of the issue the Court submitted certain interrogatories to the Jury and on the basis of the answers the Trial Judge entered judgment in favor of the defendant on the ground that Lipsett, Inc. was the statutory employer of the plaintiff. The facts which form the basis of the action are as follows:

On November 5, 1954, Lipsett, Inc. contracted with Pennsylvania Power and Light Company "to purchase the equipment at [Pennsylvania Power and Light's] . . . Allentown, Kulpmont, Lykens and Williamsport Steam Electric Stations for a consideration of One Hundred Thousand Dollars, ($100,000), [and] . . . to remove and load same . . ." With reference to the work at the Williamsport plant the contract further stipulated:

> "All the equipment in the main power plant building to be removed, that building and the two stacks demolished and all the debris disposed of to our satisfaction by April 1, 1956."

On August 29, 1955, after having begun work at Williamsport, Lipsett contracted with Andershonis, Inc. whereby the latter agreed, for a consideration, "to demolish the existing power plant and two smoke stacks . . . All resultant debris to be removed . . . and the area graded

to the satisfaction of the Pennsylvania Power and Light Company." In addition, Andershonis was to "prepare and outload all steel and iron and nonferrous (sic) and equipment generated from this plant . . ." for which it was paid at a given rate per ton. This material was shipped in accordance with instructions given by Lipsett.

Lipsett then withdrew completely from the plant, and Andershonis thereafter commenced operations. On November 4, 1955 plaintiff, an employee of Andershonis, was injured while dismantling equipment in the plant. He now seeks recovery from Lipsett on tort principles.

Lipsett interposed the defense that it was liable to plaintiff under the Pennsylvania Workmen's Compensation Act and hence not amenable to common-law suit. In support of this position Lipsett relied upon § 203 of the Act, Pa. Stat. Ann. tit. 77, § 52 (1952), which reads:

> "An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employee or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employee or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employe."

In reply, plaintiff insisted that the word "control" as used in § 203 referred to actual physical control; and that Lipsett's complete withdrawal prior to the entry of Andershonis therefore rendered the section inapplicable. The Court, being of the opinion that the correct test of the so-called "statutory employer" status under § 203 was the "right of control" rather than "actual" control, submitted an interrogatory to the jury that posed the question whether defendant Lipsett had retained a right of control over the work done by Andershonis. This was answered in the affirmative; and judgment was entered for defendant on the theory that it was the statutory employer of the plaintiff

and liable only under the Workmen's Compensation Law. In response to other interrogatories the jury found both Lipsett and Andershonis negligent and assessed damages in the sum of $100,000.

Plaintiff now moves the Court to vacate the judgment and enter judgment for plaintiff in the amount of $100,000. and in the alternative for a new trial.

The principal, although not the sole issue on this motion, is whether the Court correctly interpreted § 203 as requiring merely a right of control as opposed to actual physical control. If the Court is in error in that regard, plaintiff is entitled to judgment in the amount of $100,000. since Lipsett clearly did not exercise actual control. The statutory language must be the initial source of guidance. The pertinent portion reads "premises occupied by him or under his control". The use of the word "control" without qualification may lend support to plaintiff's argument that to be charged with liability under the provision one must actually be present and exercising control while the work is in progress. On the other hand, since "occupied" connotes physical presence, the disjunctive use of the word "control" may suggest that physical presence is not an invariable characteristic of the latter. This interpretation is not, of course, the only permissible one; for "occupied" may imply something in the nature of a proprietary interest as opposed to physical presence. If it does, "control" could be read as necessitating actual control consistently with the requirements imposed by the term "occupied". Lack of clarity in the statutory phrasing is further revealed by the failure to specify the time at which "control" must exist. The conclusion that it need obtain only when the subcontractor enters the premises is readily supported by the language of the Act. Adoption of this interpretation would render nugatory the lack of actual control thereafter. At best, the provision is somewhat nebulous on this point. The opposing parties seek to resolve the ambiguity by recourse to either "strict" or

"liberal" interpretation. No aid is discernible in the use of these terms, for they are themselves of varying content. Compare 3 Corbin, Contracts § 533 (1951). The Court feels that the proper approach to the difficult task of interpretation involves a consideration of the purposes and philosophy of the statute together with whatever legislative history is available. With the insight derived from such an examination, a solution may be reached that is most nearly in accord with the intent of the legislature. *See McDonald v. Levinson Steel Co.*, 302 Pa. 287, 292; 153 Atl. 424, 425 (1930); *Gallivan v. Wark Co.*, 288 Pa. 443, 450; 136 Atl. 223, 225 (1927); *Davis v. Philadelphia*, 153 Pa. Sup. 645, 649-50; 35 A. 2d 77, 80 (1943).

The search for legislative history has been unproductive. Records of hearings, debates and committee reports are nonexistent; the only material for scrutiny is the legislative pattern that has developed over the years. The section, as originally enacted, was identical to that now in force. See Act of June 2, 1915, P. L. 736; Laws of Pa. 1915, No. 338, Art. II, § 203, at 738. In 1937 it was amended to read in part:

> ". . . whether said injury occurred upon premises occupied or controlled by the employer or not . . . ."

Act of June 4, 1937, P. L. 1552; 2 Laws of Pa. 1937, No. 323, Art. II, § 203, at 1555. This section was held unconstitutional in *Rich Hill Coal Co. v. Bashore*, 334 Pa. 449, 464-67; 7 A. 2d 302, 310-11 (1939). The Court reasoned that while the former Act made it possible for the employer to supervise the conditions of the work, the section as amended "imposes responsibility upon an employer without giving him reciprocal authority." 334 Pa. at 464-65, 7 A. 2d at 310. As an outgrowth of this case the legislature enacted the present provision. Act of June 21, 1939, P. L. 520, P. S. 77, § 52.

If the state legislature were treated as a single entity the difficulties in interpretation might be considerably

fewer. Having been thwarted in its 1937 attempt to render "control" irrelevant, the argument might lie that the legislature intended the section now in force to merely satisfy the objections set forth in the *Rich Hill* decision. In other words, the legislature intended to retain as much of the extremely broad coverage attempted in the 1937 Act as was constitutionally possible. Since a right of control would arm the employer with the authority deemed necessary in the *Rich Hill* case, this would presumably be the preferred criterion. The infirmity in this approach stems from the fact that the composition of the General Assembly in 1939 differed from that of 1937. To thus base decision upon a projection on the intent of the earlier legislature would appear unwarranted.

Fortunately, more substantial aid is found in a consideration of the purposes and philosophy of the Workmen's Compensation Act. Viewed in its entirety it is essentially a humanitarian measure motivated by a desire to afford workmen a modicum of protection against the economic consequences of industrial accidents. These accidents and the economic privations emanating from them represent an unavoidable concomitant of an industrial society. The workman is not normally in a position to shoulder the burden as it affects himself and his family, and resort to the remedies of the common law revealed glaring inadequacies in their efficacy as a protective instrument. Since the genesis of the problem is the industrial type economy, it was thought appropriate that the burden be borne by industry, and perhaps ultimately by the consuming public. Such a price is not too high to pay for the supposed benefits derived from modern industry. The Act was intended to accomplish this objective of cloaking the workman with a protective mantle by placing the risk of loss in the first instance upon the direct recipient of the worker's efforts—industry. See 1 Skinner, Pennsylvania Workmen's Compensation Law 14-35 (4th Ed., 1947), particularly at 15-17, 19-20, 22, 25.

Cognizance of the over-all purpose of the Act suggests the interpretation favored by the Court at trial. Distinctions cannot be drawn between industrial accidents so far as their consequences and the corresponding need for protection of the workmen involved are concerned. From this it would seem to follow that the legislative purpose can, in full measure, best be realized by an inclusive interpretation. Of course, the language of the Act circumscribes the area of permissive interpretation; but, as noted previously, the terminology of the provision in question may quite reasonably be read to fit the instant case.

This view is further borne out by the motivation behind § 203. The Supreme Court of Pennsylvania has said that the section was intended to insure that liability for compensation would rest with a responsible party. It was believed more probable that the prime contractor would meet this description than subcontractors since the owner will insist upon financial responsibility of the person with whom he deals before letting the original contract.

> ". . . The act intended to throw the burden on the man who secured the original contract . . . to the end that employees of any degree doing work thereunder might always be protected in compensation claims."

Qualp v. James Stewart Co., 266 Pa. 502, 509; 109 Atl. 780, 782 (1920).

Once again, implementation of the policy would seem to call for inclusion and application of the section wherever possible; for the difference between actual control and right of control bears no discernible relevance to the thrust of the legislative policy determination.

And indeed, holding one liable under the Act where he has retained the right of control is certainly not without justification.

> ". . . His presence there gives the employer the power of control over him. If he is doing his work in

> a reckless manner the employer can make him correct his conduct or order him off the premises. If he is working under dangerous conditions, the employer can correct the conditions or order him off the premises until the danger is averted. . . ." *D'Alessandro v. Barfield*, 348 Pa. 328, 334; 35 A. 2d 412, 414 (1944).

The crucial feature is the ability of the one charged to take precautions against possible injuries. The absence of authority which the Supreme Court found objectionable in the *Rich Hill* case is satisfied by retention of a right of control. The fact that an employer may choose not to utilize the authority retained certainly does not in any way diminish the justification of charging him with liability for injury, nor is it a factor of constitutional significance.

Plaintiff's case is an appealing one. He has suffered severe injuries, and it may be that the recovery in a common-law action would recompense him more adequately than a compensation award. However, the effect of accepting plaintiff's contention would not be limited to the instant case, but rather would redound to the detriment of other workmen similarly situated. Exclusion of plaintiff from the Act's protection necessitated exclusion of others as well. The short-sightedness of thus endangering the legislative scheme by predicating a rule upon the appealing features of a single case is obvious and to be shunned. Cf. *Byrd v. Blue Ridge Cooperative, Inc.*, 356 U. S. 525, 535-56 (1958) (Frankfurter, J. dissenting). Accordingly, the Court must conclude that retention of a "right of control" satisfies the statutory requisites for liability under the Act. Plaintiff's reliance on *Boettger v. Babcock & Wilcox Co.*, 242 F. 2d 455 (3d Cir. 1957) is misplaced; for the question now before the Court was not involved and hence not decided there.

But this does not dispose of the case; for plaintiff has another string to his bow. He next contends, citing *McDonald v. Levinson Steel Co.*, 302 Pa. 287, 153 Atl. 424 (1930),

that § 203 may be invoked only where there is a principal contract upon which a subcontract depends. Stated another way, one who is an owner or is in the position of an owner cannot be charged as an employer. The rule as stated is unquestionably borne out by the *McDonald* case. There the defendant was erecting a shed upon ground he held under a lease. Although not obliged by the terms of the lease to construct the shed, it was to become the property of the lessor at the conclusion of the term. Defendant contracted out portions of the work; and subsequently an employee of one of the contractors was injured. The Court held that since there was no principal contract between defendant and the lessor, he was in the position of an owner so far as the erection of the shed was concerned, and hence not within the coverage of § 203.

Plaintiff seeks to turn the principle of the *McDonald* case to his advantage by insisting that defendant Lipsett's contract with Pennsylvania Power and Light Company was a purchase and sale rather than merely a demolition contract. Since it was a sale, the argument proceeds, there is no prime contract upon which liability under § 203 may be premised.

It is not clear from a reading of the Lipsett-Pennsylvania Power and Light contract that the building at Williamsport was purchased in addition to the equipment therein. However, this is a point of no consequence. In assessing the effect of the contract its real nature rather than its form will be determinative. See *Capozzoli v. Stone & Webster Engineering Corp.*, 352 Pa. 183, 186-87; 42 A. 2d 524, 525 (1945). In the instant case, regardless of the technical form of the contract, Lipsett was obligated thereby to demolish the building and stacks, remove the equipment, and dispose of the resulting debris to the satisfaction of the Power company. In this sense it was a demolition contract even if also a sale. This much was conceded by plaintiff's counsel on oral argument. There was, therefore, an obligation on the part of Lipsett which

was subsequently subcontracted to plaintiff's immediate employer Andershonis, Inc. In the *McDonald* case the Court emphasized the fact that the lessee was under no compusion to erect the shed, 302 Pa. at 298, 153 Atl. at 428; in the instant case there was compulsion, and § 203 is applicable. Although not factually identical, *Frankel v. International Scrap Iron & Metal Co.*, 157 F. Supp. 709 (E. D. Pa. 1957), is in accord with the proffered analysis.

Plaintiff also raises several subsidiary questions on this motion. There were not pressed either in his brief or at oral argument; and no discussion is deemed necessary to indicate their lack of cogency. Plaintiff's motions, therefore, will be denied.

ORDER.

And Now, to wit, this 15th day of July, 1959, for the reasons set forth in the Opinion filed concurrently herewith, it is Ordered, Adjudged and Decreed that plaintiff's motion to vacate judgment entered for defendant and enter judgment for the plaintiff for the sum of $100,000.00, together with plaintiff's motion for a new trial limited to the issue of whether the defendant, Lipsett, Inc., was the statutory employer of the plaintiff be and they are hereby Denied.

By The Court:

/s/ Thomas J. Clary,

J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,999

JERRY GIRARDI,

Appellant

v.

LIPSETT, INC.

v.

ANDERSHONIS, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued January 19, 1960

Before GOODRICH, MCLAUGHLIN and KALODNER, *Circuit Judges.*

OPINION OF THE UNITED STATES COURT OF APPEALS.

(Filed March 7, 1960.)

By GOODRICH, *Circuit Judge.*

This is an appeal from a judgment for the defendant entered by the District Court for the Eastern District of Pennsylvania in a personal injury action brought against the defendant, Lipsett, Inc.[1] All the problems in the case were very carefully considered in an opinion filed by District Judge Clary, 174 F. Supp. 813 (E. D. Pa. 1959). Since we agree with him, this opinion can be appropriately shortened.

The only substantial problem in the case is whether the district judge was correct in concluding that Lipsett was a "statutory employer" of the plaintiff under the provisions of the Pennsylvania Workmen's Compensation Act and was, therefore, not subject to suit for common-law negligence.

---

1 Jurisdiction is based on diversity of citizenship. Although neither party raises the problem, we believe it desirable to indicate the manner in which federal diversity jurisdiction attached in this case. The original complaint was filed on September 27, 1956, and listed Pennsylvania Power & Light Company (a Pennsylvania corporation) and Lipsett, Inc. (a New York corporation) as party defendants. Plaintiff Girardi was listed as a New York citizen (with residence at Veterans Hospital in the Bronx). On November 27, 1957, plaintiff moved to amend his complaint to allege that at the time of filing the complaint he was a citizen of Pennsylvania. This unopposed motion was granted on September 22, 1958. On October 6, 1958, Pennsylvania Power & Light Company moved to dismiss the case as to it for lack of diversity of citizenship. The motion was granted. The action then proceeded to trial which culminated in judgment for defendant Lipsett, Inc. and Judge Clary's denial of plaintiff's motions to vacate judgment and for a new trial from which plaintiff appeals.

Ever since Strawbridge v. Curtiss, 3 Cranch. (7 U. S.) 267 (1806), it has been settled that in order for there to be diversity jurisdiction in the first instance there must be diversity of citizenship between *each* plaintiff and *each* defendant in the case. However, it is equally true that a federal court may drop nondiverse defendants and retain jurisdiction over the case where those dropped defendants are not indispensable parties. See Kerr v. Compagnie De Ultramar, 250 F. 2d 860, 862-63 (2d Cir. 1958); Horn v. Lockhart, 17 Wall. (84 U. S.) 570, 579 (1873). Thus, the court below, by dropping Pennsylvania Power & Light Company as a party defendant, retained jurisdiction over the case.

Pennsylvania Power & Light Company (P. P. & L.) desired to remove certain equipment and demolish certain buildings and other structures at four of its steam electric stations in Pennsylvania. Lipsett paid P. P. & L. $100,000 for what P. P. & L. called Lipsett's "offer to purchase the equipment. . . ." While thus phrased in terms of a sale and purchase the contract further provided, with respect to the Williamsport steam electric station, at Williamsport, Pennsylvania, that: "All the equipment in the main power plant building to be removed, that building and the two stacks demolished and all the debris disposed of to our satisfaction by April 1, 1956." Thus it is seen that while Lipsett was buying materials it was also entering into a demolition contract which was to be performed to the satisfaction of P. P. & L. In July, 1955, Lipsett, after having begun work at the Williamsport station, had its superintendent remove all of its equipment and take its men away from the job; it is admitted by Lipsett's counsel that Lipsett thereafter did not have any actual control or possession of the premises. On August 29, 1955, Lipsett entered into a contract with the third-party defendant, Andershonis, Inc., by which the latter agreed to demolish the plant and stacks, remove the debris, and prepare and outload all the steel and iron for a stipulated price. During the work by Andershonis, Girardi, an employee of that company, was badly hurt. The jury found, and the finding is not disputed, that both Lipsett and Andershonis were negligent and that the negligence contributed to Girardi's injuries. Can the plaintiff recover against Lipsett?

Defendant's argument is that it is a "statutory employer" within the meaning of Section 203 of the Pennsylvania Workmen's Compensation Act of 1915, PA. STAT. ANN., tit. 77, § 52. If it is, then it is not subject to liability in a common-law negligence action. See *Gallivan v. Wark Co.*, 288 Pa. 443, 136 Atl. 223 (1927).

This section, as read by the Supreme Court of Pennsylvania in *McDonald v. Levinson Steel Company*, 302 Pa. 287, 294-295, 153 Atl. 424, 426 (1930), is as follows:

"An employer [principal contractor] who permits the entry upon premises occupied by him or under his control of a laborer . . . hired by . . . a contractor [subcontractor], for the performance upon such premises of a part of the employer's [principal contractor's] regular business entrusted to . . . such contractor [subcontractor], shall be liable . . . in the same manner . . . as to his own employee."[2]

The plaintiff would have the instant case read on *McDonald* where a suit against the defendant was held to lie. He argues that Lipsett could not be a "statutory employer" because it was an owner as was the defendant in *McDonald*. But, in the *McDonald* case, the defendant, owner of a lease hold in land, was building a structure thereon for its own convenience. It was the owner, albeit not the owner of the fee, of the land on which the structure was being built. Lipsett was an owner of the metal which it bought, no doubt, but it was not the owner of the land. As already pointed out, it was on P. P. & L.'s land under its agreement to demolish the building by a certain date and to the satisfaction of the company. Its only privilege on the land was to remove the scrap metal and do this demolition work.[3]

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2 The section was originally enacted in 1915. Act of June 21, 1915, P. L. 736, laws of Pa. 1915, No. 338, Art. II, § 203, at 738. In 1937 it was amended to include a clause which read: "whether said injury occurred upon premises occupied or controlled by the employer or not." Act of June 4, 1937, P. L. 1552, 2 Laws of Pa. 1937, No. 323, Art. II, § 203, at 1555. In Rich Hill Coal Co. v. Bashore, 334 Pa. 449, 464-67, 7 A. 2d 302, 310-11 (1939), this clause was held to make the section violative of the Pennsylvania constitution. Later that year, the legislature enacted the present provision which is identical to the provision in force prior to the 1937 amendment.

3 It should also be noted that even the court in *McDonald* envisioned certain situations where the lessee could be a "statutory employer." "The owner of premises may contract with his lessee to erect a structure, and in such case the lessee would be acting as an erector, builder, or principal contractor and not as a lessee." 302 Pa. at 298, 153 Atl. at 428. We are not here faced with a problem of logical inconsistency such as that which faced the court in *McDonald*.

The plaintiff also insists that our decision in *Boettger v. Babcock & Wilcox Co.*, 242 F. 2d 455 (3d Cir. 1957), shows that the trial court was in error here. We do not agree with that. The *Boettger* decision gives us no guidance to the answer in this case for the court was there concerned with a wholly different problem.

So we go back to the words of the statute. At the time Lipsett entered the premises of P. P. & L. in Williamsport, it was certainly a principal contractor and it was both occupying and controlling the premises. Immediately prior to the time Andershonis went to work under the subcontract, Lipsett itself, it may be granted, was not physically occupying the premises. Its equipment and men had been taken away. But it was not through with the premises. It is true that it made a contract with Andershonis to do what it had contracted with P. P. & L. to do, but this did not release Lipsett from its contract, certainly not as a matter of law and certainly not as a matter of fact because there is an express finding by the jury to that effect. The plaintiff complains that the jury was allowed to consider the fact that Lipsett told Andershonis where to ship the scrap which Andershonis collected on the property. We see no error in this for we think it is some evidence of Lipsett's right to control. We do think it more important as to the right to control that Lipsett is bound by its agreement with P. P. & L. to do certain things on this land at Williamsport to the satisfaction of P. P. & L. and by a given date. It, therefore had the obligation to control and must exercise it if necessary to perform its contract.

So we are left with what has already been described as the main question whether "control" as used in Section 203 means actual control or a right to control. We are not helped by plaintiff's very earnest and, indeed, very able argument about "strict," "liberal," "literal" and "inclusive" interpretations as applied to the problem here.[4]

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4 As we most recently did in J. E. Faltin Motor Transportation, Inc. v. Eazor Express, Inc., — F. 2d — n. 5 (3d Cir. 1959) (a case

Both parties and the court below have searched in vain for any reported legislative history behind Section 203.

We turn then to the Pennsylvania decisions. In *Qualp v. James Stewart Co.*, 266 Pa. 502, 509, 109 Atl. 780, 782 (1920), a case which the plaintiff thinks little of, the court said: "The legislature wanted to definitely fix some responsible party with the obligation of paying compensation to injured workmen, and the party selected was the first whose duty it was to assume control of the work . . . " The plaintiff disputes the premise that "principal contractors

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involving interpretation of a contract), we once again call attention to Llewellyn, *Remarks On the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-04 (1950) in which the author lists some canons of statutory construction under the fencing terms of thrust and parry. The following are of particular relevance here:

"THRUST	BUT	PARRY
2. Statutes in derogation of the common law will not be extended by construction.		2. Such acts will be liberally construed if their nature is remedial.
12. If language is plain and unambiguous it must be given effect.		12. Not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose.
16. Every word and clause must be given effect.		16. If inadvertently inserted or if repugnant to the rest of the statute, they may be rejected as surplusage."

The Pennsylvania Statutory Construction Act of 1937, PA. STAT. ANN. tit. 46, §§ 501-602, tells us that a statutory provision such as the one before us must be strictly construed. *Id.* at §§ 558(8), 581. And Pennsylvania case law tells us to construe the section "literally." McDonald v. Levinson Steel Co., 302 Pa. 287, 292, 153 Atl. 424, 425 (1930). See also Gallivan v. Wark Co., 288 Pa. 443, 449, 136 Atl. 223, 225 (1927). But Pennsylvania case law also tells us that Section 203 "must be liberally construed to effectuate its purpose." Davis v. City of Philadelphia, 153 Pa. Super. 645, 650, 35 A. 2d 77, 80 (1943).

Additionally, we are entitled to presume that the legislature does not intend unreasonable results and that it intends to favor the public interest over any private interest. PA. STAT. ANN. tit. 46, § 552 (1), (5).

are more likely to be financially responsible than subcontractors," which he ascribes to the court in *Qualp*.

Our function here is not to agree or disagree with premises adopted by the Pennsylvania courts in interpreting Pennsylvania statutes. It is to get, as best we can, the point of view of the Pennsylvania courts with regard to the statute and apply it. We think the quote from *Qualp* is helpful to this end: So, also, is this one from *Swartz v. Conradis*, 298 Pa. 343, 345, 148 Atl. 529, 530 (1929).

> "When the relationship of contractor, subcontractor, and employee springs into existence, the Compensation Act takes hold; the common law relation of the parties theretofore existing is changed into a statutory relation."

We think, also, it is significant, as the defendant argues, that the language of the statute is disjunctive and says premises "occupied by him or under his control." To require both occupancy and control would not give each clause its meaning in the disjunctive as we are required to do.[5]

It can be said, however, that here we have on the part of Lipsett a right to occupy as well as a right to control, so that even if the statutory phrase were in the conjunctive instead of the disjunctive, the result would not be changed from that already indicated.

When Lipsett first moved upon P. P. & L.'s land with its men and equipment, it was obviously in physical occupancy of the land as well as in control of the operations being conducted thereon. Thereafter, it took away the equipment and called off its men. Yet it was not free from the duties of occupancy any more than it was free from the duties of control. If Andershonis broke its contract with Lipsett, either by mismanagement or repudiation, it

5 See Davis v. City of Philadelphia, 153 Pa. Super. 645, 650, 35 A. 2d 77, 80 (1943), and PA. STAT. ANN tit. 46, §§ 551, 552(2).

would have been the duty of Lipsett to move in or get someone else to move in, to complete the job as promised to P. P. & L. The prime contractor remained liable to its promisee regardless of the number of subcontracts it made, unless released. In this case, it was not released.

We think that a Pennsylvania court would say that the obligation continuing on Lipsett here with regard to the premises and its authority with regard to the work which remained to be done under the contract made with P. P. & L. gave it both "control" and "occupancy" within the meaning, of Section 203 and made it, therefore, a "statutory employer."

The judgment of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12999

JERRY GIRARDI,

Appellant

v.

LIPSETT, INC.

v.

ANDERSHONIS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GOODRICH, MCLAUGHLIN and KALODNER, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF
Ida O. Creskoff
Clerk.

March 7, 1960.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,999

JERRY GIRARDI,

Appellant

v.

LIPSETT, INC.

v.

ANDERSHONIS, INC.

SUR PETITION FOR REHEARING.

Present: GOODRICH, MCLAUGHLIN and KALODNER, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By The Court

GOODRICH,
Circuit Judge.

Dated: March 31, 1960.

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FILED
JUL 2
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 191

JERRY GIRARDI,

Petitioner,

v.

PENNSYLVANIA POWER & LIGHT COMPANY
and
LIPSETT, INC.,

Respondent,

v.

ANDERSHONIS, INC.,

Respondent.

ANSWER OF RESPONDENT, LIPSETT, INC., TO PLAINTIFF'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1959.

No.

JERRY GIRARDI,

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PENNSYLVANIA POWER & LIGHT COMPANY
and
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ANDERSHONIS, INC.,

Respondent.

ANSWER OF RESPONDENT, LIPSETT, INC., TO PLAINTIFF'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Respondent, Lipsett, Inc., by its attorneys respectfully make answer to the petition for Writ of Certiorari as follows:

COUNTER-STATEMENT OF QUESTION PRESENTED.

Where a District Court leaves to a jury, from all the evidence in the case, the determination as to whether the general contractor had been relieved by the owner of its duty and right of control, and whether the owner had accepted a subcontractor as the sole responsible party in the place and stead of the general contractor, has not the petitioner-plaintiff received the benefit of trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States?

RESPONDENTS' STATEMENT OF THE CASE.

The petitioner brought suit for personal injuries against the Pennsylvania Power & Light Company (P. P. & L.) and Lipsett, Inc. (Lipsett). Lipsett filed an Answer alleging that it was the petitioner's statutory employer, and joined the respondent, Andershonis, Inc. (Andershonis), the petitioner's direct employer, as a third-party defendant. Prior to trial, the action was dismissed as against P. P. & L. due to lack of diversity of citizenship between that defendant and the petitioner. Following the trial, pursuant to Answers made by the jury to special Interrogatories sub-

mitted to them by the trial judge, relating to the question of statutory employment, the Court entered judgment for the defendant, Lipsett. Motions for new trial and for judgment in the petitioner's favor were overruled by the District Court. On appeal to the United States Court of Appeals for the Third Circuit, the judgment of the District Court was affirmed.

The facts giving rise to this occurrence, and the relationship between the parties are as follows:

P. P. & L., being desirous of removing certain equipment and demolishing certain buildings and other structures at four of its steam electric stations in Pennsylvania, received an offer of $100,000 from Lipsett, a demolition contractor, for the equipment and materials to be derived from the demolition of those stations. Thereupon it wrote a letter to Lipsett on November 5, 1954, accepting Lipsett's offer to purchase the equipment at the Allentown, Kulpmont, Lykens, and Williamsport steam electric stations of P. P. & L., and to demolish and remove certain buildings and other structures as expressly stated in the said letter. By the terms of the letter (Exhibit D-1, 150a), which were accepted by Lipsett, Lipsett was required, with regard to the Williamsport station, to remove all equipment, demolish the building and two smoke stacks, and dispose of the resulting debris to the P. P. & L. Company's satisfaction by April 1, 1956; Lipsett was also required to furnish a bond for the faithful performance by it "or any subcontractor that may remove the aforementioned equipment or demolish the building at Williamsport" (152a).

Lipsett thereupon entered upon the performance of this contract, but before it was completed, entered into a contract with Andershonis, a subcontractor (96a), to demolish the Williamsport Power Plant and two smoke stacks, to remove the debris, and to grade the area to the satisfaction of P. P. & L. (Exhibit P-1, 153a). Lipsett then discon-

tinued work at the Williamsport plant some time in July, 1955, and in August, 1955, Andershonis commenced work under its subcontract and thereafter continued with the demolition and the shipping out of material under direction from Lipsett until the prime contract was completed to the satisfaction of P. P. & L. It was on November 4, 1955, while Andershonis was performing the work under its subcontract with Lipsett, that the petitioner, an employee of Andershonis, was injured while engaged in his employment under that subcontract. The petitioner alleged and the jury found that while Lipsett had been engaged in the demolition work prior to August of 1955, its employees had burned or cut certain U-bolts, which held some heavy slate panels upright on a rack, and had left the panels in this precarious position with the result that they fell and struck the plaintiff while he was working nearby. The jury also found that Andershonis was negligent, presumably for failure to provide a safe place for its employees to work. These findings of fact by the jury are not questioned.

It was established of record that the parties had accepted the provisions of the Pennsylvania Workmen's Compensation Act and that the petitioner was receiving Workmen's Compensation under that act from the insurer of Andershonis.

All these facts were the subject of proofs adduced by the petitioner, with the single exception of the principal contract between P. P. & L. and Lipsett, which was offered in evidence by the respondent, Lipsett, without formal proof, and was agreed to as authentic by the petitioner.

The petitioner contended that Lipsett was not a statutory employer because it had left the premises, and Andershonis had been accepted by P. P. & L. as the contractor to complete the work in lieu of Lipsett. The trial judge accordingly submitted two Interrogatories to the jury, which were answered as follows (146a):

"'A. Does the evidence in this case satisfy you by a fair preponderance thereof in accordance with the instructions given to you, and do you find

"1. That Pennsylvania Power & Light Company released Lipsett, Inc. from its obligation to complete the contract of November 5, 1954, relating to the Williamsport, Pennsylvania, job and accepted Andershonis, Inc. as sole responsible party to complete said contract?

"A. No.

"2. That Lipsett, Inc., retained the right to control the work necessary to complete its contract with Pennsylvania Power & Light Company in accordance with the terms of the contract of November 5, 1954?

"A. Yes."

On the basis of these answers, judgment was entered in favor of the defendant, Lipsett.

REASONS FOR DENYING THE WRIT.

1. The requirement as to jury trial contained in the Seventh Amendment to the Constitution was satisfied.

2. The judgment is not in conflict with the decisions in *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U. S. 525, 78 S. Ct. 893 (1958), or *Magenau v. Aetna Freight Lines, Inc.*, 360 U. S. 273, 79 S. Ct. 1184 (1959).

ARGUMENT.

In the District Court the contentions of the parties were perfectly clear-cut:

1. Was petitioner's injury caused by the negligence of the respondent, Lipsett, or by that of the respondent, Andershonis, or by that of both? The jury found that both respondents caused the injury by their concurrent negligence.

2. Was the respondent, Lipsett, the petitioner's statutory employer? The jury's Answers to special Interrogatories established that it was.

I.

The Decision Below was Clearly Correct.

The controversy between the parties at trial turned on the proper interpretation of Section 203 of the Pennsylvania Workmen's Compensation Act wherein a statutory employer is referred to as a general contractor who "permits the entry upon premises occupied by him or under his control of a laborer" hired by a subcontractor. The petitioner contended that this clause required that the general contractor must be actually exercising control; the respondents took the position that a general contractor's *right* to control determined his status as a statutory employer, and brought him within the Workmen's Compensation Act. The respondents' interpretation was adopted by Judge Kirkpatrick of the Court below in his Opinion on a Motion for Summary Judgment (43a); by Judge Clary in his Opinion

Denying the Petitioner's Post-Trial Motions (166a); and by the United States Court of Appeals in its Opinion affirming the judgment of the lower Court (Petition, Page 14a). The petitioner now no longer contests the test of "right of control". (Petition, Page 9). The sole question petitioner raises in this Court is the District Court's ruling on a point for charge submitted by the respondent, Lipsett (159a):

> "3. The fact that none of Lipsett's employees remained at the plant after Andershonis commenced work under his subcontract has no bearing on the statutory employer status of Lipsett. As a matter of law, any general contractor has the right to limited direction, in order to assure desired results. (Waggaman v. General Finance Company, 116 F. 2d 254.)"

The Court affirmed and read to the jury only the first sentence of this point. The point was submitted, of course, to point out to the jury that it was not *actual* control, or physical presence on the premises, which determined the respondents' status, but the *right* to control. The petitioner, misunderstanding the purpose and intent of the instruction, then took exception (144a):

> "Mr. Richter: May we please take exception to that last reading of the defendant's point that the fact that none of Lipsett's men remained is not evidence of no right to control."

The Court, by way of reply, had the reporter read the full instruction as follows (144a, 145a):

> "Members of the jury, the fact that none of Lipsett's employees remained at the plant after Andershonis commenced work under his subcontract has no bearing on the statutory employer status of Lipsett. The point that I made and I am leaving with you is this: It is

> the right of control that governs. The testimony is that Lipsett's employees as such were not there after a certain day and that the contract was in fact completed. That is the testimony in the case, was in fact completed, and Andershonis apparently—there is no testimony to the contrary—completed Lipsett's obligation, which Lipsett provided in its contract with Andershonis, to the satisfaction of the Pennsylvania Power and Light."

Not only does this instruction clearly leave it to the jury to say, based on *all* the evidence in the case, whether Lipsett retained the right to control, but in the charge proper, *all* facts were left to the jury. At Pages 133a and 134a, the trial judge carefully explained the petitioner's contentions as follows:

> "Ordinarily, that would appear to create the statutory situation when the injured man, Jerry Girardi, was hurt. I say it would ordinarily do it. However, the plaintiff in this case has said no, that is not so; Lipsett is not the statutory employer and he is not the statutory employer because the evidence in this case is such as to satisfy the jury that the Pennsylvania Power and Light released Lipsett from its obligation and accepted Andershonis as the sole responsible party. He said that in that respect Lipsett has failed in his burden of proof. Secondly, he said that Lipsett had neither occupancy of the premises or control of the premises and therefore does not come within the act. You remember I read to you, 'premises occupied by or under his control,' and he said he did not retain any right to control."

The trial judge then concluded that explanation with the statement (134a):

"Members of the jury, I am leaving it to you, *from all four corners of the case*, to determine those questions which I have just posed." (Emphasis supplied.)

From these excerpts from the charge and ruling, it is apparent that the trial judge made plain to the jury beyond all question, that Lipsett's absence from the premises at the time of the injury was of no importance; that the only question for their determination was whether Lipsett still retained the *right* to control the work—that *absence* from the premises, which Lipsett admitted, was not the issue in the case; the issue was *right* to control, which the jury was to decide "*from all four corners of the case.*"

We can conceive of factual situations in which the general contractor's absence from the premises might tend to prove relinquishment of control. If there had been evidence that, although Lipsett had hired the subcontractor, Andershonis, it had then defaulted in payments on account to Andershonis, and the owner, P. P. & L., had then dealt directly with Andershonis, supervised his work, and had made payments direct to him, or Andershonis had bought the remainder of the scrap, Lipsett's withdrawal from the premises would have to be viewed in a much different light. Lipsett's absence, in such circumstances, could be held by the jury to be consistent with the plaintiff's contention that it had abandoned its principal contract and had acquiesced in the substitution of Andershonis as the direct contractor with the owner. But, as we have said, all the evidence in the case was offered by the petitioner with the exception of the principal contract, which was admitted. That evidence established the principal contract and subcontract, the completion of the work by the subcontractor, the directions given by Lipsett to Andershonis during the progress of the latter's work with regard to shipment of scrap, and the payments by Lipsett to Andershonis according to the

terms of the subcontract. The petitioner's contention that a novation had taken place was not supported by a scintilla of evidence. The petitioner's present contention, therefore, that Lipsett's absence supports an inference that Lipsett lost his right to control is legally insupportable. No one can rid himself of his duty to exercise the right to control, in order to complete his contract, by simply absenting himself, and such a finding by a jury could not be allowed to stand. We contend, in fact, that there was no disputed fact for submission to the jury. But since the general contract was not offered in evidence in the petitioner's case, but was offered by the respondent, the trial judge, from an abundance of caution, submitted the whole question to the jury. It is respectfully submitted that the jury was freely permitted to consider *all* the facts in arriving at their verdict and that plaintiff's petition should be denied.

II.

There is No Conflict of Decisions.

The petitioner contends that the decision below is in conflict with the decisions of this Court in *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U. S. 525, 78 S. Ct. 893 (1958) and *Magenau v. Aetna Freight Lines, Inc.*, 360 U. S. 273, 79 S. Ct. 1184 (1959).

In the *Byrd* case one of the respondent's affirmative defenses was that under the South Carolina Workmen's Compensation Act the petitioner had the status of a statutory employee and was, therefore, barred from suing the respondent at law. The District Court struck out the defense on the ground that the respondent was not a statutory employer if, as the proofs showed, the respondent's crews had built facilities only for the respondent. The Court of

Appeals disagreed and held that the statute granted immunity if the proofs established that the respondent's own crews had constructed lines and substations which, like the work contracted to the petitioner's employer, were necessary for the distribution of the electric power which the respondent was in the business of selling. But instead of ordering a new trial at which the petitioner might offer his own proof, the Court of Appeals made its own determination on the record and directed judgment for the respondent. This Court held that since the District Court had struck out the statutory employer defense, there was no occasion at the trial for the petitioner to offer evidence to refute it; and that when the Court of Appeals entered judgment for the respondent, it thus deprived the petitioner of the opportunity of offering evidence; that even if the petitioner offered no proof of his own, the respondent's evidence, although sufficient to withstand the Motion to strike its defense of statutory employer, nevertheless presented a fact question which, in the circumstances of that case, was for the jury. It will be seen at once that this case was decided in favor of the plaintiff petitioner because disputed questions of fact bearing upon the statutory employer question were decided as a matter of law by the Court of Appeals.

In the *Magenau* case, the defendant, an interstate motor carrier, leased a tractor trailer complete with driver from one Fidler, an independent contractor. Fidler was required by his contract to furnish a driver and keep the equipment in repair. He had authorized the driver, Schroyer, to hire services where the circumstances required. Schroyer accordingly, on a trip from Syracuse, New York, to Midland, Pennsylvania, hired the deceased plaintiff for $25 to accompany him on a portion of the trip, to aid in the event that he had tire or battery trouble. The questions arose during the trial (1) whether the deceased plaintiff, Ormsbee, was a trespasser or a licensee on the truck, and (2)

whether he was a statutory employee of the defendant. The trial judge submitted to the jury the following Interrogatory:

> "Question: Do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver, Schroyer, engage the decedent, Ormsbee, Jr., to accompany him for the remainder of the trip?"

The jury's answer was in the affirmative, and the Court of Appeals held that this answer classified the decedent as respondent's employee, placing him within the Workmen's Compensation Act. But the trial judge had, during the discussion of this Interrogatory, said "you notice I refrain from saying just what his (decedent's) status is. I don't think it necessary for the jury to find whether he was employed or not; I think that is a question for the law."

The decision of this Court was that the quoted instruction and answer returned by the jury warranted only the conclusion that the plaintiff was not a trespasser; that the trial judge had made it clear that the question of employment was one to be decided by him as a question of law, and not by the jury; and that the petitioner had, therefore, been deprived of the right of trial by jury as to the factual question of employment. We see no conflict between the decision in the *Magenau* case and the decision below.

CONCLUSION.

The Writ should be denied.

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IN THE

Supreme Court of the United States

October Term, 1960.

No. 191.

JERRY GIRARDI,

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v.

PENNSYLVANIA POWER & LIGHT COMPANY
and
LIPSETT, INC.,

Respondent,

v.

ANDER SHONIS, INC.,

Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

This brief is submitted in reply to respondent's brief (designated "Answer") in opposition to the Petition for Writ of Certiorari.

ARGUMENT.

Petitioner's Evidence on the Issue of Right to Control Was Charged Out of the Case and in So Doing the Trial Court Deprived Petitioner of His Undisputed Right to Trial by Jury Under the Constitution and the Decisional Law.

The burden of respondent's "Answer" in this proceeding is readily identified. It claims very simply that ". . . all the evidence in the case"[1] on the issue of right to control was submitted and therefore, it argues, petitioner received trial by jury on the issue of statutory employment. Thus, it says, the demands of the Seventh Amendment to the Constitution of the United States and the decisional law of *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U. S. 525, 78 S. Ct. 893 (1958) and *Magnuau v. Aetna Freight Lines, Inc.*, 360 U. S. 273, 79 S. Ct. 1184 (1959) were satisfied.

It is of great importance that respondent does not dispute or remotely question our contention that the Seventh Amendment compels a jury trial on the issue here. This silent concurrence with our view adds strength to points "2" and "3" in our "Reasons for Granting the Writ." This Court expressly reserved decision on the issue in *Byrd v. Blue Ridge Rural Electric Cooperative*, *supra*. It is now ripe to be ruled upon.

Respondent's resistance to the petition collapses if it is a fact that petitioner did not have all his proffered evidence on the issue of statutory employment submitted to the triers of fact—the jury. These are the realities.

1. By written admissions, oral testimony and undisputed fact, petitioner proved respondent's *total* absence of

1. "Answer", p. 2 in respondent's "Counter-Statement of Question Presented."

possession or actual control between July 25, 1955 and the date of the accident—November 5, 1955 (66a, 81a-84a, 90a, 91a).

2. We submit, and the lower courts and respondent do not dispute, that a right to control can be abandoned. (See, for example, respondent's agreement in principle in its supposititious case at page 9 of its brief.)

3. Both lower courts were pointedly confronted with our contention that all our evidence on abandonment, which was absolutely material to the issue of right to control, was prejudicially stripped from the case, and yet neither court ruled on the point.

4. The evidence was taken from the consideration of the jury in these unequivocal terms of the trial judge:

> "The Court: Members of the jury, the fact that none of Lipsett's employees remained at the plant after Ander Shonis commenced work under his subcontract *has no bearing on the statutory employer status of Lipsett.* The point that I made and I am leaving with you is this: It is the right of control that governs . . ." (143a) (Italics ours.)

The italicized words are logically and legally erroneous, for if this right to control can be abandoned, as respondent admits it can, then the evidence in question has a *total* bearing on statutory employer status.

In an effort to blunt the excisional effect of this instruction, respondent says at page 9 of its brief:

> "From these excerpts from the charge and ruling, it is apparent that the trial judge made plain to the jury beyond all question, that Lipsett's absence from the premises at the time of the injury was of no importance; that the only question for their determination was whether Lipsett still retained the *right* to control the work—that *absence* from the premises, which Lip-

> self admitted, was not the issue in the case; the issue was *right* to control, which the jury was to decide '*from all four corners of the case.*' "

But the entire point of our argument is that like proof on any other jury issue, evidence is the be-all and the end-all. The question of whether or not respondent retained the right to control is answerable by material evidence. Respondent claimed its material evidence of right to control was that it could tell Ander Shonis where to ship the scrap. Over our objection, this evidence of respondent went to the jury although it was no more probative of right to control than is proof that when one tells a cab driver his destination he controls the driver. See Restatement of Agency, Section 227, p. 502. Our evidence was quite extensive, was highly probative of abandonment of any right to control respondent may once have had and was completely undisputed. It went to the root issue in the case. A jury could have found for petitioner had it been permitted to consider that proof.

We have never contended that the issue was absence from the premises, and for respondent to suggest that is a confession of profound weakness in its position. Of course absence is not the issue. *But it is evidence on the real issue* of right to control and it should have gone to the jury. It did not. And nothing can change that ruling which was so fatal to petitioner's case.

CONCLUSION.

The Writ should issue.

Respectfully submitted,

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ANSWER OF RESPONDENT, LIPSETT, INC., TO PETITIONER'S REPLY BRIEF.

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ANSWER OF RESPONDENT, LIPSETT, INC., TO PETITIONER'S REPLY BRIEF.

ARGUMENT.

The plaintiff still persists in misunderstanding the trial judge's treatment of the admitted fact that the respondent Lipsett was not on the premises at the time of the accident. Throughout the trial—and prior thereto, in argument on a

motion before Judge Kirkpatrick—plaintiff's contention was that a general contractor who was not on the premises actually exercising control, lost his status as a statutory employer, i.e., "an employer who permits the entry upon premises occupied by him or under his control of a laborer," etc. He contended that the U. S. Court of Appeals had laid down the test of "in fact control" in *Boettger v. Babcock and Wilcox Co.*, 242 F. 2d 455, 458. (It did not.) The defendant contended that the test was *right* to control, and that the general contractor's presence or absence from the premises was immaterial to determination of that question. The latter contention was adopted by Judge Kirkpatrick and by Judge Clary, and hence the ruling by the trial judge that the absence of Lipsett's employes "has no bearing on the statutory employer status of Lipsett." What was meant by the instruction, and the jury could not fail to understand it, was that if Lipsett retained the *right* to control, it was immaterial whether or not Lipsett's men were on the premises and exercising that control. Judge Clary made the distinction crystal clear when he explained his ruling with the words (144a, 145a):

> "The point that I made and I am leaving with you is this: It is the right of control that governs."

His charge to the jury left to that body *every fact in the case* for determination of the question of *right* of control:

> "Members of the jury, I am leaving to you, *from all four corners of the case*, to determine those questions which I have just posed" (134a).

Plaintiff then shifts his position and maintains that Lipsett *abandoned* his right to control, and says (page 3 of his Reply Brief) that the respondent does "not dispute that a right to control can be abandoned." In the first place, his own undisputed testimony flatly refuted abandonment, for Andershonis, the subcontractor, testified that Lipsett con-

tinued to direct where the scrap was to be shipped (59a), and Julius Lipsett denied that Andershonis was accepted as the contractor in the place and stead of Lipsett (96a, 97a). In the second place, we do not and did not concede that "abandonment" by Lipsett would alter his status as statutory employer. One cannot undertake the duties of a general contractor, with the obligation under the Workmen's Compensation Act which those duties impose, and then wash his hands of that obligation by "abandoning" the work to a subcontractor. He *can* terminate his obligations under the Act by bringing about a novation—an acceptance of a new contractor by the owner and a release of himself by the owner. This, in fact, was one of plaintiff's contentions, but Judge Clary said (111a):

> "You undertook to tell Judge Kirkpatrick that there was a novation. I have found no novation here, because I never have found that P. P. & L. released Lipsett."

It is respectfully submitted that the fact of Lipsett's absence from the premises *was* left for the jury's consideration, together with all other evidence in the case.

Respectfully submitted,

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